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Before the
FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Washington, D.C., 20554

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In the Matter of)	
)	
Motorola Satellite Communications, Inc.)	File Nos.
)	9-DSS-P-91 (87)
)	CSS-91-010
Request for Waiver of Section 319(d))	
of the Communications Act of 1934 to)	
Commence Satellite Construction)	
)	
Amendment of Part 25 of the)	CC Docket No.
Commission's Rules and Regulations To)	92-166
License Mobile Satellite Systems in The)	
1610-1626.5 and 2483.5-2500 MHz Bands)	

OPPOSITION

I. Introduction

Constellation Communications, Inc. ("Constellation"), by its attorneys, files this Opposition to the December 23, 1993 request of Motorola Satellite Communications, Inc. ("Motorola") for a waiver of Section 319(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 319(d), to permit it to begin construction of its proposed satellite system before grant of a construction permit by the Commission. Constellation is a pending applicant for low-Earth orbit ("LEO") satellite system and has requested authority to operate on the same frequencies in the 1610-1626.5 MHz band as those requested by Motorola. Constellation opposes the Motorola request because (i) Constellation's application may be mutually exclusive with Motorola's, and any action on Motorola's request may prejudice

Commission consideration of Constellation's request, (ii) Motorola has failed to make the required public interest showing in support of its request, and (iii) grant of the waiver would disrupt pending Commission proceedings in CC Docket No. 92-166 to establish the rules governing the design and operation of Motorola's proposed system and prejudice Commission consideration of Constellation's application to operate in the 1610-1626.5 MHz band.

II. Motorola Has Not Shown With Specificity Why
The Public Interest Requires A Grant Of Waiver

Motorola states that it has entered into agreements with its suppliers for the construction of five previously authorized experimental satellites. These agreements include options for the construction of Motorola's 66 operational satellites that it wants to exercise in the third and fourth quarters of 1994. Motorola does not detail the specific items it intends to build if the requested waivers are granted, only that the funds would be expended for long lead items in connection with the construction of the satellite bus and main mission antennas. Motorola does not explain whether the funds would be used for procurement of long lead items from hardware suppliers or for actual construction of the bus and antennas of its proposed satellites. Nor does Motorola indicate on how many of its proposed 66 satellites would begin construction if the waiver is granted. Thus, as a threshold matter, Motorola's Section 319(d) waiver request is incomplete because it fails to include the types of information normally required by the Commission in such a request. It should therefore be denied.

Furthermore, Motorola provides no specific details on what would happen if it did not exercise the contract options on their due dates. Motorola does not indicate

specifically how much more the satellites would cost if there were a delay in exercising the options, nor does it indicate specifically how long satellite delivery would be delayed if the contract options were delayed. Motorola only claims that it will suffer "serious economic consequences" and raises the specter of project worker layoffs, contract renegotiations, jeopardization of the U.S. national interest, loss of U.S. global competitiveness, trade deficits, jobs and national economic growth if this waiver request is denied. There are two major problems with this scenario.

First, these dire predictions grossly overstate the amount of the expenditures involved. If the Section 319(d) waiver request is granted, only \$30.513 million would be spent by Motorola. This amount is simply too insignificant to have any meaning in the context of the overall national interest, U.S. economy and trade deficit. These overgeneralizations of potential adverse impact from a denial of a Section 319(d) waiver, as well as arguments based on the desirability of the early provision of service, are simply insufficient to support grant of a Section 319(d) waiver. If the Commission were to consider such generalized arguments sufficient, Section 319(d) waivers would be so routinely granted that the Commission could just as well eliminate the need for construction permits in their entirety. Instead, the Commission has consistently treated Section 319(d) waivers as exceptional actions and required very specific and concrete public interest justifications before granting them.

Moreover, even in the context of the Motorola satellite program itself, Motorola acknowledges that these expenditures are less than 1% of its total system costs, and are small compared to the amount of money already expended by Motorola on this project.

It is hard to believe that Motorola has in fact negotiated contracts with its suppliers that would bring this program to the crashing halt alluded to (but not asserted as fact) in its waiver request if it fails to exercise these options. Motorola provides no specific facts to support its waiver request, except that Motorola wants to begin service in 1998 and that it wants to exercise these options in order to maintain that schedule. However, the Commission has previously limited its granting of Section 319(d) waivers to exceptional situations.¹ This limitation is designed to ensure that the Commission can process pending applications in an orderly manner. It will therefore not grant Section 319(d) waivers unless there is an overwhelming public interest reason for the grant. Certainly, Motorola's justification does not meet this test, as its alleged need arises from Motorola's self-imposed schedule. Motorola has offered no other concrete reason why the public interest would be served by a grant to it of a Section 319(d) waiver. Motorola's schedule convenience is not sufficient for such a grant. Accordingly, Motorola's Section 319(d) waiver request should be denied for failure to demonstrate why the public interest would be served by such a waiver.

III. Grant Of A Waiver To Motorola At This Time Would Prejudge The Outcome Of The Pending Proceeding.

The Commission has consistently noted that Congress imposed the Section 319 bar against pre-grant construction in order to shield the Commission from undue pressure being brought by applicants claiming that they would be harmed if they lost their investment in the event the Commission ultimately denied their application.² While Motorola cites a

¹ Satellite Business Systems, 6 FCC 2d 315 (1976).

² See WJIV, Inc. v. FCC, 231 F.2d 725 (D.C. Cir. 1956).

number of previous Commission Section 319(d) waiver grants, none of them supports Motorola's claims that there is no risk of prejudging Commission action on the other pending LEO applications.

Motorola concedes that there are fundamental outstanding issues that are still in controversy among the parties. Indeed, the Commission has not yet determined whether or not the pending applications are mutually exclusive and is proposing lottery or auction procedures in the event it ultimately determines that the pending applications are in fact mutually exclusive. In none of the cases cited by Motorola did such a basic conflict remain to be resolved. Unless the Commission makes a finding that the pending applications are not mutually exclusive, the Commission cannot avoid the Congressional intent of protecting the Commission from undue influences by the Section 319 bar against pre-grant construction. Granting Motorola a Section 319(d) waiver before such a Commission finding of non-mutual exclusivity in the case of the LEO applications would establish major new precedents. One such precedent would be an expectation that experimental authorizations and associated options for full system construction could be converted into operational licenses. Another precedent would allow companies who want to operate cellular, Multi-channel, Multi-point Distribution Service or Personal Communications Service systems to expect that they could begin construction before lotteries or auctions are completed. Still another would allow competing broadcast applicants to build their stations before the Commission selects the licensee for the community being served.

Although Motorola "is confident that it will ultimately receive a license from the FCC," Motorola cannot bootstrap this belief into a demonstration that grant of the requested Section 319(d) waiver will not prejudice the pending proceedings. Motorola continues to strongly reject the view of the majority of the negotiated rulemaking participants favoring full band interference. It also rejects the Constellation/Ellipsat/TRW compromise proposal and admits that the license it would receive is "not an acceptable one." Based on the information presented at the Commission's January 19, 1994 meeting adopting its NPRM in this proceeding, it also appears that the Commission's proposal is similar to the Constellation/Ellipsat/TRW proposal, and Motorola may find similar problems with it. It is exactly for this type of situation that Congress created Section 319(d). Motorola cannot simply say that it "agrees to assume the risk that it will not receive a suitable license" or that it is willing to "proceed with construction even if auctions remain a possible licensing mechanism." Absent a spectrum sharing plan that is mutually agreed upon by all of the pending applicants included in the current application cut-off group to eliminate the mutual exclusivity question, Motorola must wait until the Commission adopts a Report and Order in this proceeding. Only after the Report and Order is adopted will there be certainty that there is no mutual exclusivity between applicants or whether the applicants satisfy technical, legal, financial and other requirements or procedures that the Commission may adopt to select among mutually exclusive applications. Until then, the Commission cannot accept Motorola's claim that it "cannot in any way influence who will receive a license" without tacitly deciding that at least Motorola will receive a license even if other similarly situated applicants may not.

IV. The Full Commission Should Make the Decision on the Motorola Section 319(d) Waiver Request

As the Commission is aware, CC Docket No. 92-166 and the related pending applications to construct and operate LEO satellite systems have been exceedingly contentious proceedings. This is a result of the possible mutual exclusivity between the pending applications. Given the significant implications that the Motorola 319(d) waiver request could have on all of these proceedings, Constellation urges the Commission not to delegate authority to the staff to make this important policy determination. In this regard, the Commission must recognize the \$30.513 million to be spent by Motorola exceeds the decisional authority delegated to the staff in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291 (1992), for consideration of Section 319(d) waiver requests of this type. To divide the \$30.513 million into stages,³ to escape the requirements of Section 0.291, would merely make a mockery of the Commission's processes. Constellation therefore urges the full Commission to make the policy determination on the Motorola 319(d) waiver request.

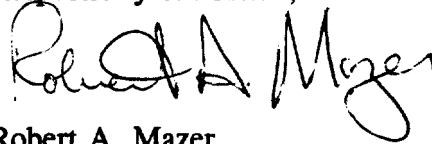
³

See Motorola Request for Waiver of Section 319(d) at n11.

V. Conclusion

Constellation requests the Commission to deny Motorola's request for a 319(d) waiver to begin construction of its proposed satellites prior to Commission action on the pending applications in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert A. Mazer". The signature is fluid and cursive, with the first name "Robert" and last name "Mazer" being clearly legible, and "A." in the middle.

Robert A. Mazer
Nixon, Hargrave, Devans & Doyle
One Thomas Circle, N.W.
Suite 800
Washington, D.C. 20005
(202) 457-5346

February 14, 1994

Counsel to Constellation Communications, Inc.

CERTIFICATE OF SERVICE

I, Robert A. Mazer, hereby certify that a copy of the foregoing document was served by first-class mail, postage prepaid, this 14th day of February, 1994 on the following persons:

Chairman Reed Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Room 302
Washington, D.C. 20554

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Gerald P. Vaughan
Deputy Bureau Chief (Operations)
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Wendell R. Harris
Assistant Bureau Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 534
Washington, D.C. 20554

James Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 6010
Washington, D.C. 20554

Thomas S. Tycz
Deputy Chief, Domestic Facilities Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 6010
Washington, D.C. 20554

Cecily C. Holiday, Esq.
Chief, Satellite Radio Branch
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 6324
Washington, D.C. 20554

Fern J. Jarmulek, Esq.
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 6324
Washington, D.C. 20554

James Ball, Esq.
Acting Director
Office of International Communications
Federal Communications Commission
1919 M Street, N.W.
Room 658
Washington, D.C. 20554

Thomas P. Stanley
Chief Engineer
Federal Communications Commission
2025 M Street, N.W.
Room 7002
Washington, D.C. 20554

Raymond LaForge
Federal Communications Commission
2025 M Street, N.W.
Room 7334
Washington, D.C. 20554

Robert M. Pepper
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W.
Room 822
Washington, D.C. 20554

Michael Nelson, Ph.D.
Special Assistant --
Information Technology
Office of Science and Technology
Policy
Old Executive Office Building
Room 423
17th and Pennsylvania, N.W.
Washington, D.C. 20500

Mr. Richard D. Parlow
Associate Administrator
Office of Spectrum Management
NTIA
U.S. Department of Commerce
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

Mr. William Hatch
NTIA
U.S. Department of Commerce
14th and Constitution Avenue, N.W.
Room 4096
Washington, D.C. 20230

The Honorable Lawrence Irving
Assistant Secretary for
Communications and Information
NTIA/OIA
U.S. Department of Commerce
14th & Constitution Avenue, N.W.
Room 4898
Washington, D.C. 20230

Ms. Jean Prewitt
Associate Administrator
NTIA/OIA
U.S. Department of Commerce
14th & Constitution Avenue, N.W.
Room 4720
Washington, D.C. 20230

Mr. Jack A. Gleason
Division Director
NTIA/OIA
U.S. Department of Commerce
14th & Constitution Avenue, N.W.
Room 4720
Washington, D.C. 20230

Philip L. Malet, Esq.
Alfred M. Mamlet, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
Counsel for Motorola Satellite
Communications, Inc.

Norman P. Leventhal
Raul R. Rodriguez
Stephen D. Baruch
Leventhal, Senter & Lerman
2000 K Street, N.W., #600
Washington, D.C. 20006

Jill Abeshouse Stern, Esq.
Jane M. Sullivan, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
Counsel for Ellipsat Corporation

Linda K. Smith, Esq.
Robert Halperin, Esq.
William Wallace, Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
Counsel for Loral Qualcomm Satellite
Services, Inc.

Leslie Taylor, Esq.
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817-4302

Bruce D. Jacobs, Esq.
Glenn S. Richards, Esq.
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
Counsel for AMSC

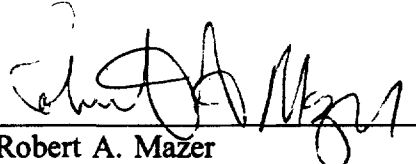
Lon C. Levin, Esq.
Vice President and Regulatory Counsel
AMSC Subsidiary Corporation
10802 Parkridge Boulevard
Reston, Virginia 22091

Dale Gallimore, Esq.
Counsel
Loral Qualcomm Satellite Services, Inc.
7375 Executive Place, Suite 101
Seabrook, MD 20706

Gerald Hellman, Esq.
Vice President
Policy and International Programs
Mobile Communications Holdings, Inc.
1120 - 19th Street, N.W.
Washington, D.C. 20036

Richard G. Gould
Telecommunications System
1629 K Street, N.W.
Suite 600
Washington, D.C. 20006

Dr. Robert L. Riemer
Board of Physics & Astronomy
National Research Council
2101 Constitution Avenue, N.W.
Washington, D.C. 20418


Robert A. Mazer